THOUGHTS

ON

MARTIAL LAW,

AND

ON THE PROCEEDINGS

OF

GENERAL COURTS MARTIAL.

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PREFACE.

AMONGST the Gentlemen of the Army, for whom alone this treatiſe hath been compiled, many unqueſtionably will be found, who from experience and ability, are beyond the reach of any information, which the Author can give them, either, in their executive or deliberative capacities. To them, therefore, little need be ſaid. Their candor, will, unſolicited, teach them to look with indulgence on a performance, calculated for the meridian of a Military ſphere; and their good ſenſe, to protect it, ſhould it be deemed not unworthy of their patronage. The young, and inexperienced, however, are thoſe, for whom theſe hints are principally deſigned. They, from the novelty of the ſcene, recently perhaps appointed, either, in the Regulars or Militia, cannot intuitively acquire a knowledge of the duties of their profeſſion. To aid the diſpoſition of doing well, the rule muſt be preſcribed;—for juſtice may be intended, though injury may reſult, from an ignorance of the principles, on which a man, profeſſionally ſhould act.

Were it in the inclination of the Author, the few following pages, might readily be ſwelled into a volume of a reſpectable appearance. The materials are abundantly numerous for it; and the attempt, would moſt probably be received with a degree of approbation, by the public in general. But, men in the field, are not to be amuſed with argumentative diſcuſſions. Quick in their deciſions, they ſtand in need of general

general principles, more than of a variety of cases. In this idea, these thoughts were with difficulty drawn into their present compass.

The assistance received from Mr. S. P. Adye's Treatise on Martial Law, hath not been inconsiderable. The references made by that gentleman to the several authorities, who have treated on the subject, exempted the Author from a laborious and unpleasant investigation of statutes, pleas of the crown, &c. Had Mr. Adye, indeed, been more particular with respect to the *proceedings* of General Courts Martial, the present work, would never have been obtruded on the world. But, as he is silent on points which may every day occur, and which have frequently perplexed the decisions of a court;---And as the officers of the army, have invariably expressed a desire, to be informed decisively of the grounds on which they stand, an attempt to ascertain them, may not be unwelcome, or ill-timed. In short, if in this hour of unhappy contest, with our deluded brethren on the Western shores of the Atlantic, and of actual hostility, with the ungenerous branches of the family of Bourbon, one unpresuming effort, can be found to tend towards the safety, and well-being, of even the lowest veteran of the camp,---every purpose of the Author is fulfilled.

ERRATA.

Page 5,	line 12,	for emyloyment,	*read* employment.
16,	7,	whethes	whither.
28,	6,	safely say he may	may safely say he may.

THOUGHTS

ON

MARTIAL LAW, &c.

IN a country famed throughout the world for the wiſdom of its laws, the excellency of its civil and criminal juriſprudence, and the jealouſy of its members to the ſmalleſt innovation of the liberty of the ſubject; it is a matter of ſingular conſideration, that, ſo little hath been written on the Martial Law of England. That this may have proceeded from its dryneſs and ſterrility, will readily be allowed. A ſcience without profeſſors, muſt inevitably fall into diſreputation; beſides which, the diſcipline of a camp, in every eſſential, moſt widely different from that of a common court of law, may have made it unworthy of the attention of thoſe, whoſe abilities would have enabled them to have expatiated on the ſubject.

In the one, indeed, where eſtabliſhed formality preſides, the crime * which the law puniſhes, as well as the penalty which it inflicts, is aſcertained and notorious, nothing is left to arbitrary diſcretion: the king by his judges, diſpenſes, what the law has previouſly ordained, but, is not himſelf the legiſlator. Whereas in the other, the judge both aſcertains the guilt and inflicts the puniſhment at his diſcretion.

Martial Law, in general hath been defined, a temporary excreſence, bred out of the diſtemper of the ſtate, and not as any part of the permanent and perpetual laws of the kingdom. Sir Matthew Hale, and Sir William Blackſtone, ſay, it is built upon no ſettled principles, but is entirely arbitrary in its deciſions, and is in truth and reality no law, but ſomething indulged rather than allowed as a law. However this may be,—the Law Martial of England is indiſputably authorized by an act of the legiſlature. The king is empowered to form, make, and eſtabliſh articles of war, both for his own troops, and for thoſe of the Eaſt India Company. He is likewiſe empowered to grant a commiſſion or warrant under his royal ſign manual to the directors of the Eaſt India Company, who by virtue of ſuch warrant or commiſſion, can delegate their authority to their preſidencies abroad; and this act, it is ordained, ſhall continue in full force for one year, and then be ſubject to reviſion, and further prolongation.

When we conſider therefore, in the time of war, when this act is calculated with efficiency to operate, that no leſs perhaps

* Blackſtone, Vol. I. Page 415.

than

than a million of ſubjects, either in arms for their Sovereign, or as retainers to his camps, are amenable to its coercion; and that the power of the crown, an unlimited power to create * crimes, and annex puniſhments to them, not extending to life or limb, is not unalienably confined to the ſovereign himſelf, but is diffuſed by delegation, to his different officers on ſervice, it will not be deemed a reflection, hazarded without ſome foundation, to ſay, that thoſe whoſe more immediate province it has been, to digeſt a code, and throughout the forces, to eſtabliſh an uniformity of law procedure, have been negligent in the ſervice of their country.

The ſtudy of the law, hath been deemed, a more than a ſufficiency of employment, for the life of any one man. If therefore the intricacies of that wily labyrinth, can occupy the time of a perſon, entirely devoted to its ſervice, where are we to ſuppoſe, that thoſe in the military line, are to be found, who in the buſtle of the field, are to dedicate their time to a tedious, and to them, an unprofitable labour? Proceſſes and retainers out of the caſe, even chancery itſelf, would loſe its reputation. No man in theſe days works, but, in the proſpect, or in the certainty of reward. The ſoldier therefore, who ſpends his days in toil, and his nights in hardſhip and fatigue, cannot in juſtice be ſuppoſed to have the means, or diſpoſition, of qualifying himſelf for a court of law, or for that moſt ſerious and important of all his duties, the paſſing of judgment on his fellow creatures.

* Blackſtone.

Impreſſed in a high degree, with the pureſt, and moſt tenacious principles of honour, and regulating their conduct by the dictates of equity, inſtead of thoſe of ſtubborn ordination, officers may be ſuppoſed to be the moſt unexceptionable judges; but, in truth, the more benevolent, and praiſe worthy they are, in the effuſions of the finer diſpoſitions of the ſoul, the more liable they are to err. Rigour in ſuch minds, is ſeldom found exerted. They acquit when in their power, without an adherence to the nicities of diſtinction; and clemency by thoſe means acquires a hue, and oftentimes, the effects of ſeverity itſelf.

To obviate theſe inconveniencies, a Judge Advocate is appointed, whoſe province it is, to know the law. But, on actual ſervice, how ſeldom are lawyers to be met with? A Subaltern, therefore, is uſually employed in that department. If then officers of long experience and ability, cannot be ſuppoſed to have had opportunities ſufficient, to have cultivated their talents in a field, ſo deſtitute of laurel; how much leſs ſo, can it be expected in thoſe, whoſe years and underſtandings, may not have arrived at their period of maturity?—That law, with all its dire concomitants, would be pernicious in a camp, we moſt readily will ſubſcribe to. Brevity is eſſentially neceſſary on ſervice. But, at the ſame time that we concur in the baniſhment of all the ſubtilties of the law; we muſt as readily confeſs, that a general knowledge of its principles ſhould be encouraged, leſt thoſe ſhould appear unequal to the taſk, who may be placed upon the judgment ſeat of mercy.

In

In the conviction of the propriety of this opinion, the following thoughts have been thrown together. Unſkilled in the deeper reſearches of the ſcience of the law, all abſtruſe reaſoning hath been avoided. The authorities, however, from whence each article hath been ſelected, have been carefully marked down. The very words of ſome are given, nor are there any points omitted, as far as we can judge, and as far as the extent of this little eſſay is meant to reach, which could in any wiſe tend to elucidate the ſubject. The deciſion of the candid, will determine how far theſe purpoſes have been anſwered.

The king, as we have already ſaid, being empowered by act of parliament, to eſtabliſh certain regulations for the better diſciplining of the army, hath, in the articles of war before-mentioned, enumerated all ſuch crimes as are puniſhable with *death*, and in general all ſuch as are cognizable by a Court Martial, when acting within the reach of the civil power. Many commentators on the laws, however, have given it as their opinion, that, beſides thoſe enumerated in the articles of war, *Aliens* *, who in a hoſtile manner invade the kingdom, and who in company with rebels of the country or otherwiſe, are ſeized and deemed worthy of puniſhment, cannot be dealt with as traitors, but, muſt be turned over to the authority of the Martial Law. However this be, the articles of war in general are explicit with reſpect to ſuch miſdemeanors, as can be tried under the ſanction of the military act.

* Hale's P. 4. C. 10. 15. 3. Coke's Inſt. 2.

The

The power thus exiſting in the ſovereign, and by appointment in his delegates to direct Courts Martial to be held, and a general Court Martial being required, the perſon thus exerciſing the power, iſſues a warrant to ſome officer, as the preſident, and to other officers, as the members of the court, which he finds it neceſſary to appoint. And the more effectually to prevent the evil conſequences, which might reſult from the abſence of any of the members, who ſhall thus have been appointed, it is provided for and ordained that, no officer, or ſoldier, while in orders as a member of a Court Martial, ſhall * be ordered on any other duty; nor is the court permitted, to ſit longer at a time, than from eight o'clock in the morning, 'till three in the afternoon, excepting in ſuch caſes as require an immediate and rigorous example.

The general Court Martial being thus in orders to aſſemble, and the witneſſes for and againſt the impending trials being ſummoned to attend, the court forms itſelf at the appointed place, agreeably to its commiſſion, and in the manner following: The members being duly ſeated,—the Preſident at the head, and the other members, according to their ſeveral ranks and ſtandings in the army, the Judge Advocate calls over their names one by one, beginning with the Preſident; and then having received from the Preſident his warrant, he reads aloud the Preſident's appointment, and afterwards the commiſſion by which he officiates as Judge Advocate himſelf. This being done, and the priſoner to be tried being

* Articles of War.

brought

brought before the court, (he being previouſly furniſhed with a copy of his crime, and informed by the Judge Advocate of the time and place allotted for his trial) the Judge Advocate, who acts in the double capacity of Recorder to the court and council for the king, demands, *If he has exceptions to any of the members preſent.* If he has not, the Judge Advocate ſwears in the court, and proceeds to the trial; but, if he has, the exceptions which he pleads, are to be deliberated upon by the court, and admitted (if they are found of conſequence ſufficient) by the ſubſtitution of new members in the room of thoſe ſo excepted againſt. No member, however, can be excepted againſt after the formation of the court, neither can an ignorance of his former character be pleaded againſt him, unleſs he ſhall have perpetrated ſome deed, or have been principally or acceſſorily concerned in the commiſſion of ſome act, ſubſequent to ſuch formation, which ſhall be adduced as guilt againſt him.

Exceptions, however, being pleaded, it becomes of ſerious inveſtigation to the court, to determine on thoſe which ought to be admitted, and on thoſe which ought to be rejected. Many, but all of them of ſome conſequence, are the exceptions, which a culprit may advance againſt a juror in a common court of law; and equitably proceeding, it is not more than juſtice to a priſoner to admit them in the ſame extent at a military tribunal; (which in all caſes where the act is ſilent ſhould be ſuppoſed to be regulated in a ſimilar manner with other courts of judicature) and the more eſpecially, when it is conſidered that members of a Court Martial, ſit not only as *jurors*, but, ultimately as *judges*. In oppoſition to this indeed, it has been ſaid, that lord George Sackville excepted againſt general Belford, but, that his reaſons not being ſufficient,

they

they were over-ruled by the court. The truth, however, is, that lord George Sackville did not except againſt general Belford, he did not offer what he advanced as a legal objection to that officer as a member of the Court Martial; he rather ſubmitted his reaſons to the court, and to general Belford himſelf, for their conſideration §. Exceptions, therefore, being allowed, the moſt material are thoſe which hereafter ſhall be enumerated. Before we come to that point, however, it may not be unneceſſary to remark, that, in a court of law, and in a criminal cauſe, when the Sovereign of the ſtate is neceſſarily a party, the council who proſecuteth in his behalf, hath in like manner with the priſoner, a right to challenge, and either *peremptorily*, or *with cauſe*, to declare his exceptions againſt a juror.

The courſe of Military Law winding itſelf in many forms, in the ſame channel with that of civil and criminal juriſprudence, *a court of enquiry*, is frequently appointed in like manner with a grand jury, to ſearch into complaints, and finally to determine, whether the perſons complained of, are puniſhable by law. Members of a court * of enquiry therefore are liable to be excepted againſt as members of a Court Martial, that is, if they ſhall ſit as members on the ſame cauſe, or if upon the trial of another action wherein the ſame † matter is in queſtion, it ſhall happen to be material though

§ Sackville's Trial, Page 6.

* Adye.

† 8 Henry 4. 2 pl. 4. Coke upon Littleton, 157. 6.

not

not directly in iſſue. It is likewiſe adjudged good cauſe of challenge on the part of the priſoner, that the juror hath a claim to the forfeiture ‡, which ſhall be cauſed by the party's conviction, or that he hath declared his opinion before-hand § of the party's being guilty, or will be hanged, or the like; but, a priſoner ſhall not examine a juror concerning ſuch matter upon hearſay ‖, becauſe it ſounds in reproach: and it hath been adjudged, if it ſhall appear, that the juror made ſuch declaration from his knowledge ** of the cauſe, and not out of any ill-will to the party, it is no cauſe of challenge; and it furthermore hath been adjudged no good cauſe of challenge that the juror hath found others guilty on the ſame indictment; for the indictment is judgment in law againſt each defendant, every one being convicted by particular evidence againſt himſelf.

The law alſo allows infamy to be a good cauſe of challenge, particularly if the juror hath been convicted of treaſon, felony, perjury *, &c.—but, theſe exceptions cannot well occur at a Court Martial, and beſides none of theſe are principal challenges (though perhaps allowed, on ſtrong preſumptive proof) unleſs the record of their conviction be produced and ſhewn.

‡ State Trials, Vol. 1. f. 502.

§ 21 Hen. 7. 20 pl. 10. State Trials, Vol. 4. f. 184, 185.

‖ 49 Edward 3. 1 pl. 2.

** Rolles' Abridgment, 67, Letter I.

* Coke upon Littleton, 158.

A principal challenge is ſuch when the cauſe aſſigned, carries with it *prima facie* †, evident marks of ſuſpicion, either of malice or favour; as that a juror is of kin to either party within the ninth degree, that he has been arbitrator on either ſide; that he has an intereſt in the cauſe; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the ſame cauſe; that he is the party's maſter, ſervant, counſellor, ſteward or attorney, or of the ſame ſociety or corporation with him. All theſe are principal cauſes of challenge, which, if true, cannot be over-ruled, for jurors muſt be ‡, *Omni exceptione majores.*

The above being in general the exceptions, which ought to be admitted at a General Court Martial, either on the part of the priſoner, or of the ſovereign, we ſhall now proceed to the formation, or what is in common ſtiled, the ſwearing in of the court. The preamble as inſerted in the articles of war, being firſt read to the Preſident by the Judge Advocate, the Judge Advocate adminiſters to him the oath; and then continuing with the members, agreeably to their ranks, and as many at a time, as conveniently can be ſworn, he afreſh reads to them the preamble, and tenders them reſpectively the oath; and after that, the oath which it is ordered he ſhall take, is adminiſtered to him by the preſident, and ſo the tribunal is formed.

† Blackſtone, Vol. 3. Page 363.

‡ Ibid.

Unacquainted

Unacquainted with the ſerious conſequence of a ſtrict attention to the *minutiæ* of form in criminal proceedings, General Courts Martial have looked upon the firſt ſwearing in of the court, as ſufficient authority to warrant their proceeding on the trial of a variety of offences; whereas, in propriety, the court ſhould be ſworn afreſh at the commencement of every new proſecution; for though, as judges, as in a court of common law, once ſwearing would be ſufficient; yet, as jurors who are ſworn on every different trial, though identically the ſame men, ſo are the members of General Courts Martial to be conſidered, when a new criminal is brought before them. Leſt, however, an eſtabliſhed, and a heretofore undiſputed practice ſhould have acquired a force, ſtill difficult to be eradicated, we ſhall here endeavour to point out thoſe reaſons, which induce us, to this opinion. In the oath which is taken by each of the ſeveral members of a General Court Martial, the words, *matter* * and *priſoner*, are cautiouſly inſerted. Theſe words therefore being abſolutely confined to a ſingle matter and a ſingle priſoner; and *matters and priſoners* not being ſubjected to their juriſdiction, how is it poſſible that men, with propriety, can proceed on a trial, which they are not warranted by law to decide upon? Were the obligation in the articles of war expreſs as to the trial of all matters, and all perſons, and in all caſes; or were the court poſſeſſed of the authority of extending the meaning of the oath, once ſwearing would undoubtedly be ſufficient; but, as in every reſpect, the very contrary is evident,—as the very words of the oath itſelf ſay, words which cannot be altered but by the legiſla-

* Articles of War.

tute, that "they ſhall well and truly try and determine according "to their evidence, in the matter before them, between their "Sovereign Lord the King's Majeſty, and the priſoner to be "tried." * how can it be otherwiſe than an unwarrantable irregularity in them, to proceed on the trial of offenders, who in the eye of the law, are not amenable to their authority? Led away by the practice of others, men of the beſt intentions, are often found obſtinate in principles, which without reflection they have adopted. And in this view may be conſidered, the many inſtances which have occurred of unwillingneſs in General Courts Martial to be afreſh ſworn on a new trial. Were the ceremony, long, tedious, or troubleſome, or were it to involve any thing extraordinary in its conſequences, the oppoſition which it hath met with, might in ſome degree be accounted for. But, when it is univerſally known to be a matter, of but a momentary interruption; and at the moſt to be only an adherance to a form; how ſtrange does it not appear, that men, inſtead of the pleaſant paths of certainty, ſhould prefer thoſe of perplexity and doubt? In every event, however, and by whatever means the cuſtom may have been eſtabliſhed, one thing is certain, that conforming to a rule never can be wrong, and that, therefore, the following implicitly the articles of war, is only complying with the ordinations of that power, which alone hath authority to abrogate, or alter laws.

* Articles of War.

The

The Court Martial being regularly formed in the manner we have before mentioned, and the witneſſes in attendance, the Judge Advocate begins upon the proſecution. Prepared with the charge, which muſt particularize, as well *time, place,* as *circumſtance,* and the priſoner ſtanding before the court, the Judge Advocate aſks him, upon reading to him his crime, *how ſay you,—are you guilty of the crime laid to your charge, or not?* For if he ſhould plead guilty, or refuſe to plead, as in many inſtances is the caſe, the proſecution immediately is cloſed, and judgment is paſſed accordingly;—but, on the contrary, if he ſhould throw himſelf upon the deciſion of his peers, and conſequently ſtand his trial, by pleading not guilty, the witneſſes on the part of the crown, are *viva voce* to be examined and their depoſitions recorded by the Judge Advocate. And here indeed it ſhould be remarked, that the plea of *not guilty,* ſhould at all times be encouraged in trials at a General Court Martial, for, however, conſcious a priſoner may be himſelf of the unjuſtifiableneſs of his own conduct, there may circumſtances appear to mitigate the atrociouſneſs of a crime, and in ſome degree ſerve to entitle him to mercy.

The oath to be adminiſtered to witneſſes, runs thus,—*You are true and perfect anſwer make, to all ſuch queſtions, as ſhall be put to you, touching the matter now before the court, between our Sovereign Lord the King's Majeſty, and the priſoner to be tried, which ſhall be the truth, the whole truth, and nothing but the truth, ſo help you God.*—Nor is this oath to be tendered, but, in the preſence of the whole court, and of the priſoner himſelf, although *deputations,* as they are called, have frequently been ſent to examine a witneſs, who from illneſs hath been unable to attend. It is true his Majeſty annulled the proceedings

ceedings of one Court Martial, for having appointed ſix of their members to take the evidence of a valetudinary witneſs. But, ſtill the practice is continued. The deputation is evermore employed, although in fact, its irregularity is at any time ſufficient to render the proceedings nugatory;——No part, being equal to the whole, unleſs the delegation of its power is warranted by law. To avoid the conſequences attendant upon a meaſure of this kind, therefore, the whole court ſhould adjourn themſelves to the houſe or quarters of the ſick perſon, and there, and in the preſence of the priſoner, examine and take his depoſition.

The priſoner, however, being put upon his trial, the Judge Advocate, as proſecutor for the crown, begins with his proof, of the delinquency of the priſoner's conduct. To this end,—he examines and croſs examines the ſeveral witneſſes,—calls upon every one, who can adduce teſtimony in favour of the proſecution, and aims in every reſpect to eſtabliſh the certainty of guilt. The court likewiſe, as judges, take part in the proſecution,—they alſo examine and interrogate, and in concert with the Judge Advocate, endeavour to arrive at a knowledge of the fact. The Judge Advocate, however, ſhould have concluded with the examination of a witneſs, before the interrogatories of the court are in general propounded. For although ſuch interrogatories may be pertinent and applicable, yet as the ſeveral members have in the end, an opportunity of drawing forth anſwers to ſuch queſtions as they may put, and as an interruption of the Judge Advocate, may probably break in upon a chain of leading and neceſſary information, it were at all times to be wiſhed, (except in particular and complicated caſes) that, he were ſuffered to finiſh with his examination, before the introduction of any new matter, were admitted

admitted by the court. The examination in behalf of the crown being at an end—The priſoner croſs queſtions the witneſs if he pleaſes, or defers it till he is put upon his defence. A privilege indeed which is allowed him, through every ſtage of the proſecution.

In the examination of witneſſes, a cuſtom hath prevailed, which in all its conſequences, ſeems to affect both the principles of equity and juſtice. This hath been, the admiſſion of perſons ſubpœned on a trial. Officers and men, have by this means found their way into General Courts Martial, when a witneſs on the ſame ſide, hath been labouring under the preſſure of a variety of queſtions. The difficulties which he encountered, have thereby been dexterouſly avoided. The degenerate amongſt them, in the replies which he hath made, have learnt the way of undeviatingly keeping in the ſame ſtory. The purpoſes of croſs examination, have conſequently been fruſtrated, and a criminal perhaps hath been adjudged to ſuffer, when contradiction in the evidence might poſſibly have ſaved him. No evidence, however, can be given againſt a priſoner, but, in his preſence, neither can hearſay evidence be admitted.

The examination of the crown witneſſes being brought to a concluſion, the priſoner is put upon his defence. If a ſoldier, he generally commences it without adjournment;—if an officer, a time is uſually begged for preparation, and his prayer is granted, if the period is not deemed to be unreaſonable. Thus arrived at the moſt ſerious and important moment of his trial,—the inſtant of clearing up his honour, or of ſinking under a load of infamy and guilt,—what is there not required to enable him to act with judgment

and

and deliberation? Probably uninformed of letters, a private centinel, or ſerjeant!—Poſſibly a ſubaltern, as yet in youth, and unacquainted with the ſtrictneſs of diſcipline and order! Unaided, perhaps, by counſel, or by friends;—left to the wild, unconnected dictates of his own fancy,—how, and in what manner is he to effect one ſalutary purpoſe for himſelf?—Unhappy Being!—diſtracted with his fear, and ſinking under apprehenſion, whether is he to turn himſelf, to eſcape from the threatening arms of deſtruction?—Fate, hangs impending o'er his head!—He hears nothing,—He knows nothing! He implores for mercy,—He ſubmits himſelf to Heaven, and the equity of his judges. You, therefore, who are ordained to preſide over, and decide the deſtiny of your fellow-creatures,—protect him with your counſels,—lead him, with a cautious hand through the mazes of his defence,—and as in the hour of proſecution, you aimed to fix his guilt, ſo now, in the moment of exculpation, aſſiſt him in the vindication of his innocence.

In the courſe of the proſecution, as hath been already ſhewn, the Judge Advocate officiates as council for the king, and in the defence, he is allowed to reſtrain the delinquent from advancing any thing, to criminate himſelf. This, in ſome caſes may be too circumſcribed a power. But, however, as the court themſelves, have the privilege of trying every means to exculpate the priſoner from guilt, it is leſs to be regretted, that the *Law-Officer* is not declaredly permitted to afford him that aſſiſtance which he might ſtand in need of. Not that indeed it could be of any material ſervice to him, except in thoſe inſtances, when council could not be procured, as otherwiſe, a crimimal at a general Court Martial, as

criminals

criminals in any other court, hath a right to the benefit of advice from thoſe capable of aſſiſting him. When the jury is ſworn (ſays an eminent lawyer) * if it be a cauſe of any conſequence, the indictment is uſually opened, and the evidence marſhalled, examined, and enforced by the council for the crown, or proſecution. But, it is a ſettled rule at common law, that no counſel ſhall be allowed a priſoner upon his trial, upon the general iſſue, in any capital crime, unleſs ſome point of law ſhall ariſe proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law when rightly underſtood, that the *judge* ſhall be *counſel* for the *priſoner*, that is, ſhall ſee that the proceedings againſt him are legal and ſtrictly regular) ſeems to be not at all of a piece with the reſt of the humane treatment of priſoners by the Engliſh law. For upon what face of reaſon can that aſſiſtance be denied, to ſave the life of a man, which yet is allowed him in proſecutions for every petty treſpaſs? Nor indeed is it ſtrictly ſpeaking, a part of our antient law: for the *mirrour* having obſerved the neceſſity of counſel in civil ſuits, "who know how to forward and "defend the cauſe, by the rules of law, and cuſtoms of the "realm"—immediately afterwards ſubjoins "and more neceſſary are "they for defence upon indictments and appeals of felony than upon "other venial cauſes." And to ſay the truth, the judges themſelves are ſo ſenſible of this defect in our modern practice, that they ſeldom ſcruple to allow ‡ a priſoner, counſel, to ſtand by him

* Blackſtone, Vol. 4, Page 348.

‡ Ibid.

at the bar, and inſtruct him what queſtions to aſk, or even to aſk queſtions for him, with reſpect to matters of *fact*: for as to matters of *law* ariſing on the trial, they are *intitled* to the aſſiſtance of counſel.

The priſoner being thus aſſiſted by the aid of council, as we ſafely ſay he may, under the ſanction of ſuch high authority, and the examination of his witneſſes being at an end, the Judge Advocate is allowed to reply* to his defence, not, however, upon any new ſubject matter that ſhall appear, but, ſtrictly to that, which ſhall relate to the original charge;—and in like manner as the Judge Advocate, the priſoner is indulged in anſwering him in rejoinder. He is likewiſe permitted to adduce the teſtimony of perſons of reputation, in ſupport of his character and the integrity of his life,—for if for mutiny, deſertion, or any other crime, there ſhall be nothing, but, preſumptive proof; the evidence of his former good conduct, will indiſputably ſerve to influence a deciſion in his favour.

In tranſgreſſions puniſhable by Martial Law, the evidence in general is ſo poſitive and clear, that it ſeldom or ever happens, that a criminal is convicted without a more than a ſufficiency of legal proof. One § witneſs, however, (if credible) is evidence enough to a jury of any ſingle fact, though undoubtedly the concurrence of

* Lord George Sackville's Trial.

§ Blackſtone.

two

two or more would ſtrengthen and corroborate the proof. Preſumptive * evidence, even hath been deemed ſufficient for condemnation, although the priſoner hath abſolutely denied the fact. This muſt certainly be admitted in many caſes, as for inſtance, in that of murder, when the deed is uſually perpetrated in ſecret, and when conſequently no witneſs can be preſent; but, then it is a proof that ſhould be warily allowed: guilt, may undoubtedly be brought to puniſhment by it, but, innocence may as often fall a victim to its influence.

The law careful of the rights, and watchful o'er the ſafety of individuals, hath wiſely ordained, that priſoners ſhall be admoniſhed not to criminate themſelves by an acknowledgment of their guilt. The power of coercion, it would have exerted only on the cleareſt proof. The confeſſion, ** however, of the fact before a magiſtrate, a juſtice of the peace, or a ſecretary of ſtate, hath at all times been admitted as evidence againſt the defendant being the party confeſſing; but, not againſt others †; though it hath been an univerſal and an eſtabliſhed cuſtom, in thoſe proſecutions when a man's confeſſion hath been adduced to his own diſadvantage, ‡ that the whole, and not particular parts, ſhall be produced before the Court.

* Blackſtone.

** Hale's P. C. 102, 262, 263, 264.

† State Trials, Vol. 3. f. 89.

‡ Hawkin's P. C. 6, 2, c. 46.

In the caſe of informers, whoſe veracity ſhould ever be ſuſpected, and whoſe conduct ſhould as carefully be watched, experience ſhews the neceſſity of caution in the admiſſion of their evidence. Can the wretch, who from the dread or certainty of puniſhment, ſinks into that loweſt of all human baſeneſs, the betrayer of the ſecrets of his friend; or who, ſpurred by the hope of gain, aims for a few pounds, at the life of his fellow creature;--can he be truſted in the teſtimony he may advance in the proſecution of his treachery? Mercy, tells us no. The attributes of juſtice, and of fair benevolence, are decked in robes of kindneſs and humanity. Calmneſs and mature deliberation, attend them in their courſe. Suſpicion is awake, but, unerring truth is evermore their guide. And yet, the written depoſition of an informant, ſubſcribed to, and taken upon oath before a juſtice of the peace, upon a commitment for a capital offence, is * admitted as evidence at the trial of that offence; provided, upon oath, and to the ſatisfaction of the Court it ſhall appear, that he, (ſuch informant) is § dead,---unable to travel, or prevented from appearing through the means or machinations of the priſoner, † and that the depoſition which is then offered in examination, is litterally the ¶ ſame with that ſworn to before the magiſtrate. But, it is not a ſufficient reaſon for the authorizing the admiſſion, or the reading of ſuch a depoſi-

* State Trials, Vol. 1. f. 265.

§ Hale's P. C. 262, 263.

† Keeling's Reports, 55.

¶ Ibid.

tion

tion, for the profecutors to ſay,---*Search hath been made, but the informant is not to be found.* This even on oath is not enough. The legal diſabilities above mentioned muſt be proved, otherwiſe the Information is of no ‡ avail.

The law furthermore declares that, a priſoner may in, exculpation of himſelf, or in the deſire of eſtabliſhing a conviction of the little reliance to be placed on the depoſition of a witneſs, call * for the evidence which that witneſs ſhall have given on oath before a magiſtrate; and in the compariſon of that, with his *viva voce* evidence before the court, if a variation can be found; he may plead that variation in ſupport of his own character and juſtification. And to the ſame end, ſhould a witneſs at one trial, vary † from his evidence at another, both trials tending to the ſame matter of fact, ſuch variation may be advanced as good invalidation of the teſtimony of the evidence, which he ſhall depoſe at the ſecond trial. How far hear-ſay evidence ſhould be admitted, is a ſubject of ſuch complicated diſcuſſion, and involves in its conſequences, ſuch a variety of reaſoning and argument, that it is hard to determine on it. In Martial Law, the ſtrictneſs of diſcipline, might lead one to

‡ Keeling's Reports, 55.

* State Trials, Vol. 2d. f. 622 to 627, 644, 647, 657.

† State Trials, Vol. 2. f. 343, 344, 528, 529.

ſuppoſe

ſuppoſe, that hear-ſay evidence might be admitted. But, in Martial Law, as in every other code of juriſprudence, however, the letter of it may ordain, the ſpirit of it certainly is repugnant to the admiſſion of proof, of ſuch a flimſy texture;—Nor indeed is there a neceſſity for General Courts Martial, to adopt an evidence, eventually filled with injury and injuſtice. Poſitive and direct teſtimony, as I have already ſaid, is never found wanting at a Military Trial. Officers and ſoldiers are public in their acts;—Their crimes are generally notorious, and therefore, the eyes of the many cannot but be ſet upon their tranſgreſſions. That which a priſoner, however, hath been heard to * ſay at a time antecedent to his commiſſion of a crime, may be received as evidence by a court, to the end, that it may invalidate or confirm the arguments he may advance, in the courſe of his proſecution and defence.

In trials for high treaſon, where the law is not only peculiarly direct, but circumſtantial, as to the nature of the proof which is required, previous to the condemnation of a criminal; the ſimilitude of hand-writing, hath as frequently been rejected, † as admitted as evidence on the part of the crown. The prevalence of forgery hath been the opprobium of this, as well as of every other civilized nation, from the earlieſt period of time. Deſperate in his fortunes, or ſanguine in his revenge, the villain meditates in ſecret, the deſpoiling of another of his property or life. Nothing more fea-

* State Trials, Vol. 2, f. 254.

† Skinner's Reports.

ſible, than the acquiſition of the ſtyle, or manner of a man's writing. As a painting, his ſignature is to be copied.—His very ideas, by attention and ability are to be caught;---in a word, innocence cannot ſave, nor loyalty protect him, ſhould a ſimilarity of writing be indiſcriminately admitted, as a poſitive confirmation of his guilt. Uſage, indeed, eſtabliſhes that a ſimilitude of hands, is no evidence in a criminal caſe, altho' it ſhould be capital, unleſs the papers ſhall be * found in the poſſeſſion of the perſon---then, the law accounts it a corroboration of the charge, but otherwiſe their authenticity is doubted, and they cannot be received as articles of crimination againſt the priſoner.

The admiſſion of the evidence of huſband and wife againſt each other, being in law but one perſon, hath been ſingular and uncommon; though in caſes of abſolute neceſſity, it hath ſometimes been received ‡. But, an exception to a parent, or to kindred in general, altho' a good cauſe of challenge againſt a juror, is no cauſe of challenge againſt § a witneſs. The law, therefore allows a father to be a competent witneſs for or againſt his ſon, or *é converſo*; and a maſter for or againſt his ſervant, or *é converſo*. In all theſe inſtances, however, and in all others which may ſhew themſelves at a General Court Martial, the Court itſelf hath the diſcretionary power of regulating the degree of credit, with which each evidence ſhall be received.

* Skinner's Reports.

‡ State Trials. Trial of Lord Audly.

§ Hales P. C. 276, 277.

In

In the former part of this tract, the exceptions which a priſoner is entitled to plead, either peremptorily or otherwiſe, againſt jurors, are particularly enumerated; nor is it of leſs utility to be acquainted with thoſe *, which are in common law admitted againſt witneſſes on the trial. The moſt material are, the parties having been convicted of treaſon, felony, piracy, præmunire, perjury, or forgery. Their being in judgement in attaint for giving a falſe verdict, or for being in a conſpiracy at the ſuit of the King. Their being adjudged for any crime whatever, to ſtand in the pillory, to be whipped, or to be branded, and this by a court of competent juriſdiction. But, theſe exceptions are only of avail, while the decrees continue in full force; nor are they admiſſible, unleſs the records of the decrees ſhall actually be produced in court ‡. The law, however, allows, that in all caſes, it is ſufficient for a witneſs to be either a gainer or a loſer by the iſſue of the cauſe, whether immediate or conſequential to diſqualify his teſtimony; and yet, in General Courts Martial, the evidence of inferior officers, is admitted againſt officers of ſuperior rank. But, this is found neceſſary to ſubordination. Law, could not exiſt, if amongſt a ſet of military men, the ſame exactitude and preciſion were obſerved, as is found to be beneficial in the courts of Chancery and King's Bench.—In all corps of officers, preferment is in view. From the higheſt to the loweſt,—a ſomething more advantageous or honourable is always to be expected.—When caſualties happen, thoſe caſualties are to be filled up: Promotion con-

* Coke upon Littleton, Raymond, Rolle, M. Rep.

‡ State Trials, Vol. 1. f. 268.

ſequently takes place,—and the whole may be thereby juſtly conſidered, as intereſted in the fate, and deſtiny of each other. Officers, therefore, being unreſtrained by any legal incapacity of ſuppoſed intereſtedneſs in their depoſitions, are explicitly to ſpeak to facts, but, at the ſame time are to be guardedly reſtrained from the avowal of any act which eventually may tend to the crimination of their own reputations.

An infant * may be excepted againſt as being of years inadequate to knowledge, but, Villeins or Bondſmen, a claſs of people indeed no longer known in England, are free to give their teſtimonies and their evidences muſt be admitted †. Accomplices likewiſe, who have not been indicted for the crime ‡, have been declared unexceptionable witneſſes, and it hath been over-ruled, that accomplices who, are indicted, are good witneſſes for the King, until they are convicted ‖. But, when, or upon what occaſion, ſuch dread-extorted evidence can, in the ſpirit of equity be received, is a matter that I am ignorant of. Men of ſcience and ability may in neceſſity find a cauſe for manifold deviations. But, judges in a Martial Court of Law, are happily diſengaged from an adherrence to a rule, which eventually may

* Hale's, P. C. 263.

† State Trials, Vol. 1. f. 253.

‡ Idem. 728.

‖ Keble's Reports.

entail deſtruction on the unfortunate. Accomplices, in every light they may be placed, cannot, but, be ſeen in guilt, and in all the heinouſneſs of the offences which they have committed. But, if in addition to their firſt crimes, they afterwards give in evidence againſt thoſe, by whom they have been entruſted;—if in the exceſs of baſeneſs, after the commiſſion of their tranſgreſſions, they exert their faculties to cruſh their unſuſpecting brethren, and ſcreen themſelves, how little is their evidence to be credited! Examine, therefore, with tenfold rigour ſuch witneſſes if they ſhall appear before you; ſearch with a probing hand into the receſſes of their ſouls;—doubt, and inveſtigate the commoneſt circumſtance they may advance; and as they have already proved themſelves deteſtable amongſt men, ſo look upon their evidence (when truth cannot be diſcriminated) as the effuſion of depravity itſelf.

In inſtances of inſanity, and while the perſon hath laboured under the effects of the indiſpoſition, exceptions have been admitted againſt him as a witneſs; although in his lucid intervals, and during the time of his underſtanding, his teſtimony hath been received *. This likewiſe is a matter of weighty conſideration, and ſhould be carefully attended to. Few men labouring under the misfortune of periodical or caſual loſs of ſenſes, can recover themſelves ſo much when their reaſon returns, as to ſee things in a clear and undiſtorted point of view. Moreover, how many are there, who rational in their appearance, and connected even in converſa-

* Hale's P. C. 278.

tion,

tion, are yet ſo miſerably reduced, as on ſome certain points, to fly into the utmoſt extravagance of phrenzy. Such evidence, therefore, ſhould be cautiouſly received. The law perhaps admits it;—but, humanity, as certainly condemns it.

By the common, as well as by the ſtatute law of England, both judges * and jurors are competent to appear as witneſſes at a criminal proſecution; and in like manner, the members of a Court Martial, are authorized to give in their depoſitions upon oath. This, though unavoidable in many inſtances, ſhould be as often guarded againſt as poſſible. No man, however, upright and determined in his own mind, but, (probably unconſcious as to what he does) may fall into a wrong train of thought from being by accident acquainted with the merits of a cauſe, and thereby being concerned in ſome degree as a party. To this end, care ſhould be had in the nomination of the court, to omit thoſe officers who poſſibly might be called upon: and the more eſpecially, as no perſon would wiſh to ſit in judgment upon another, whoſe guilt he was convinced of, and whoſe puniſhment he ſaw inevitable.

All witneſſes in a criminal court of law, being obliged to give their evidence with preciſion and *viva voce*, no matter prepared in writing is admiſſible; neither is a witneſs permitted to read it as his depoſition. He may, however, have reference to notes. This

* Blackſtone.

leaves the channel open for croſs examination. The evidence of either party may be thereby brought in contradiction, and an important turn be given to a proſecution. Witneſſes alſo are ſtrictly to adhere to circumſtances of fact. Opinions, although admitted by ſome tribunals, are doubtleſs contradictory to equity, when taken in the abſtract, and general point of view. Inſtead of one, or more, according to their appointment, a priſoner in opinions, finds an hundred judges. Each man, however, unauthorized, acquits, or condemns, according to his own particular ſentiments. "*The truth*, "*the whole truth, and nothing but the truth*," is thereby radically diſcarded. Belief, which is repugnant to their oath, is ſubſtituted in the room of certainty, and the witneſſes, unknowingly, are led to commit what may be ſtiled a treſpaſs, if not a perjury itſelf. And in proof of this, it may not be amiſs to take notice of what lord George Sackville, advanced at his own trial, when the opinion of colonel Fitzroy was demanded. "I do not think it (ſaid he) "a fair queſtion to aſk, only a matter of opinion. I do not mean "it to prevent the truth from coming out, I mention it merely "for the dignity of the court, and for the ſake of the method of "proceeding in Courts Martial. The witneſſes are to lay down "facts for your information, and your judgment is to decide upon "them. For the conſequence of a court, is not to be ſo let down, "as to form their determinations, their reſolutions upon opi-"nions." * A contradiction indeed would ſeem to appear to this, on colonel Sloper's being allowed to give an opinion "as to "the condition in which he ſaw lord George Sackville," but

* Lord George Sackville's Trial, Page 31.

then

then, that opinion as was obſerved by the Judge Advocate, was *collected* from a *circumſtance* which the witneſs *ſaw*, and thereby might be termed in a degree, an evidence of the fact *.

Although the evidence which is intended more immediately to exculpate a priſoner on his trial, is in general confined to the moment, when he is put upon his defence; yet, if any thing ſhall drop from a witneſs during the courſe of the proſecution, or while in croſs examination for the crown, that can in any wiſe be found of ſervice to the acquital of the criminal, ſuch matter, however, in his favour, ſhall carefully be admitted; and in the deciſion on the merits of the cauſe, it ſhall without reſerve be conſidered, and received, as explicit teſtimony in his behalf.

In the obſcurity, with which the ſubject of military juriſdiction hath been ſurrounded, and in the ignorance in which mankind in general have remained with reſpect to the efficiency of its power, it is not to be wondered at, that, inattention ſhould have been paid to it, by thoſe, who not being amenable to its authority, could not acknowledge themſelves, as ſubject to the decrees which it may have iſſued. I here allude to witneſſes ſubpœned, and who in contempt of Court, have contumaceouſly avoided giving their attendance, and who have otherwiſe conducted themſelves with refractorineſs and diſreſpect. No witneſs, we will acknowledge, un-

* Lord George Sackville's Trial, Page 38.

leſs

leſs his reaſonable expences be tendered to him, is bound to appear at all §; nor if he does appear, is he bound to give evidence, till ſuch charges are actually paid him, that is, if he does not reſide within the bills of mortality, and is ſummoned to give evidence within them. But, this particularly concerns the uſage of common Courts of Judicature. A martial Court of Law is different. The juriſdiction of a Court Martial in England being confined to matters merely military; namely, to breaches of the articles of war, it very rarely happens that the teſtimony of any civil perſon is neceſſary to convict the offender. And in thoſe places abroad (ſuch as Minorca) where there is no other law, than the law martial for Engliſh ſubjects, and where courts martial are therefore held for other offences, the point in caſe may not readily occur, ſince the Engliſh inhabitants are ſubject to military diſcipline. The little probability of the evil may therefore, poſſibly, be the reaſon, why no ſpecial proviſion has been made for it by law. But, certainly (and it is to be regretted that it is ſo) no ſuch proviſion being made, a witneſs not ſubject to Military Law, who refuſes, on being ſummoned to attend a Court Martial, or who negligently with-holds his attendance, cannot be impriſoned by the court. To deliver him over to military cuſtody would be falſe impriſonment, and moreover he would be enlarged on a Habeas Corpus; nor can he be delivered over to the ſheriff, or any other civil magiſtrate, inaſmuch as the members compoſing the court, have no authority to iſſue any warrant, which can juſtify the civil magiſtrate in detaining him. But, upon the general principles and analogies of law (though perhaps there be no analogous determination) a witneſs ſummoned to appear

§ Blackſtone, Vol. 3. Page 368.

before

before a Court Martial, having neceſſary evidence to give, and without any reaſonable cauſe with-holding his attendance, or contumaciouſly refuſing to attend, may be *indicted* for an offence *againſt public juſtice*, becauſe, when the legiſlature gives a court juriſdiction to adminiſter an oath, it neceſſarily implies a *duty* in the ſubject to appear to give evidence; and every *neglect* of a public duty, is puniſhable by indictment, unleſs when the act preſcribing the duty, points out a ſpecial mode of puniſhment. Witneſſes, therefore, who may be refractory and contumacious, ſhould never be permitted to eſcape the ſeverity, which the law ordains for thoſe who would ſcreen offenders, and thereby elude the wholeſome regulations of their country.

Hitherto we have confined our enquiries, to the formation of the Court, the method of its proceeding, and the examination of the witneſſes, both in behalf of the Crown, and of the priſoner. We now come to the laſt and moſt ſolemn act, the *fixing* of the *crime*, and the pronouncing of the *Sentence* of the *Law* upon it. Here, indeed, deliberation is required. The facts have heretofore appeared before us, in order to their being arranged, ſcrutinized, and compared; but, they are now to be decided upon agreeably to the laws of juſtice and of mercy. At a moment ſo awful as this, therefore, and when the fate of one, in the ſame rank of being as ourſelves, is ultimately to be fixt;—when the avenging power of Providence is thus entruſted in our hands, for the benefit of the community at large,—how cautious ſhould we be in our determination!—how attentively ſhould we inveſtigate, each open ſource, each latent principle of action! Nothing ſhould be forgotten. Coercion in all its parts ſhould carefully be weighed:—The neceſſity of puniſh-

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ment ſhould calmly be conſidered, but, above all, *Mercy*, ſhould be embraced as the benigneſt attribute of Heaven. Before we proceed then, on this moſt awful of all our duties, let us acquaint ourſelves, with the principles of guilt in general. Let us teach ourſelves to diſcriminate between thoſe, who are fit objects for the ſeverity of the law, and thoſe who from certain cauſes are acknowledged to be entitled to its lenity and forgiveneſs. Amongſt the latter, are thoſe who are under a natural § diſability of diſtinguiſhing *good* from *evil*, as infants under the age of diſcretion, ideots, and lunatics, all of whom are not puniſhable by any criminal proceſs whatſoever; neither is a perſon, who has committed a capital crime, if he becomes *non compos* before conviction to be arraigned, nor, if after conviction to be executed *. But, at the ſame time that the law is thus tender with reſpect to criminals who labour under a natural and inevitable deprivation of ſenſe; it is equally as ſevere againſt thoſe, who by intemperance, reduce themſelves to a momentary inſanity. A man, therefore, guilty of a crime through the effect of voluntary drunkenneſs, is to be puniſhed for it, as if he had been ſober ‡. Alſo he who incites a madman to commit a crime, is to be conſidered as a *principal* offender, and is to be puniſhed, as if he had perpetrated the deed himſelf ‖. The law declaring, 'that every man in his ſound mind, and at the age of

§ Hawkin's Plea. Cr. B. 1. C. 1. Hales' Plea. Cr. 10. 43. 65.

* Ibid. Coke's Inſtitutes, C. 4. 6.

‡ Coke upon Littleton. Hales' Pleas Cr.

‖ Ibid.

diſcretion,

diſcretion, is bound to know the law, and conſequently that he is puniſhable by it, if he tranſgreſſes the boundaries it hath eſtabliſhed. Beſides *principals*, there are thoſe concerned in ſome treſpaſſes, who are called *acceſſories*. An acceſſory is he, who is not the chief actor in the offence, nor preſent at its performance, but, is ſomeway concerned therein, either *before* or *after* the fact committed. As to the point who is acceſſory *before* the fact, Sir Matthew Hales' * defines him to be one, who being abſent at the time of the crime committed, doth yet procure, counſel, or command another to commit a crime. Herein abſence is neceſſary to make him an *acceſſory*, for if ſuch procurer, or the like, bepreſent, he is guilty of the crime as *principal*. As to anacceſſory *after* † the fact, he is a perſon, who knowing a felony to have been committed, receives, relieves, comforts, or aſſiſts the felon. And generally any aſſiſtance whatever given to a felon, to hinder his being apprehended, tried, or ſuffering puniſhment, makes the *aſſiſtor* an *acceſſory*. ‡ Acceſſories by the general rule of the antient law, are to ſuffer the ſame puniſhment as the principals: If one be liable to death, the other is alſo liable? § But, why then, ſays judge Blackſtone, are ſuch elaborate diſtinctions made between acceſſories and principals, if both are to ſuffer the ſame puniſhment? ¶ For theſe reaſons to diſtinguiſh the nature and denomination of crimes, that

* Hale's Pl. Cr. 615, 616.

† Hawkin's Pl. Cr. 316.

‡ Blackſton, Vol. 4. P. 37.

§ 3 Inſt. 188.

¶ Blackkon, Vol. 4. P. 39.

the accuſed may know how to defend himſelf when indicted: The commiſſion of an actual robbery being quite a different accuſation, from that of harbouring the robber. And becauſe, though by the antient common law, the rule is as before laid down, that both ſhall be puniſhed alike, yet, now by the ſtatutes relating to the benefit of clergy, a diſtinction is made between them. Acceſſories *after* the fact being allowed the benefit of clergy * in all caſes, excepting horſe-ſtealing, and ſtealing of linen from the bleaching grounds; which is denied to the *principal* and acceſſories *before* the fact, in many caſes; as among others, in petit treaſon, murder, robbery, and wilful burning. † And perhaps if a diſtinction (which certainly may be the caſe at a court-martial) were conſtantly to be made between the puniſhment of principals and acceſſories, even *before* the fact; the latter to be treated with a little leſs ſeverity than the former, it might prevent the perpetration of many crimes, by increaſing the difficulty of finding a perſon to execute the deed itſelf, as his danger would be greater than that of his accomplices by reaſon of the difference of puniſhment §. A man may be indicted as *acceſſory* and acquitted, and yet, be afterwards indicted as a *principal*; ‖ for an acquittal of receiving or counſelling a felon, is no acquittal of the felony itſelf: but, it is a matter of ſome doubt, whether if a man be acquitted as *principal*, he can be afterwards indicted as acceſſory *before* the fact, ſince thoſe offences are frequently

* Statutes, 3 Eliz. 18 Geo. 2.

† Hale's P. C. 615.

§ Becaria, chap. 37.

‖ Blackſtone.

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very nearly allied, and therefore an acquittal of the guilt of one, may be an acquittal of the other alſo. † But, it is clearly held, that one acquitted as principal may be indicted as an acceſſory *after* the fact; ſince that is always an offence of a different ſpecies of guilt, principally tending to evade the public juſtice, and is ſubſequent in its commencement to the other. ‡

These points being thus underſtood, and the court being cleared, the Judge Advocate reads over the proceedings, or ſums up the evidence, as may be moſt agreeable to the court, in each caſe, elucidating ſuch parts, as may appear either to himſelf, or to the different members, worthy of their attention. That done, and all in readineſs for judgment, he puts the following queſtion to the reſpective members, beginning with the youngeſt, *From the evidence given, for and againſt the priſoner, and from what he has ſaid in his own defence, are you of opinion that he is guilty, or not guilty of the crime which is exhibited againſt him?*—and as they declare their ſentiments, he writes them down ſeverally on a ſlip of paper. But, here it is to be obſerved, that, if in the courſe of the proſecution, it ſhall appear the priſoner is innocent of the *capital* offence exhibited againſt him, he yet is liable to be found guilty in a leſſer degree, as muſt be particularly ſpecified in the verdict. As inſtead of *murder*, *homicide* or *manſlaughter*, &c. and inſtead of *deſertion*, being *abſent without leave*. But, in all inſtances, his acquital of the capital charge muſt be inſerted, neither can he be convicted upon any ex-

† Hales' Pl. Cr. 625, 626.

‡ Blackſtone, Vol. 4. P. 40.

traneous matter. Should the majority, on the caſting up of the opinions, be found on the ſide of mercy, and their votes be *not guilty*, the priſoner is accordingly acquitted; but, ſhould they be otherwiſe, the guilt is declared, and thoſe who have condemned him * (for it cannot be ſuppoſed that thoſe who have acquitted will aſſign him any puniſhment) are to paſs ſentence upon him; always recollecting that no ſentence of death is to be given againſt an offender by a general Court Martial, unleſs two thirds of the members preſent †, ſhall concur therein; and that no perſon or perſons ſhall be adjudged to ſuffer any puniſhment, extending to life or limb in *time* of *peace*, except for ſuch crimes as are expreſſed to be ſo puniſhable by the articles of war. The form of paſſing ſentence is thus. The Judge Advocate beginning with the *junior* of thoſe members who have found the priſoner *guilty*, proceedeth in theſe words. *Having declared it as your opinion, that the priſoner is guilty of the crime of* ——, *what is the puniſhment, that you would have inflicted on him?* And as the member adjudges, which may be either to death, corporal puniſhment, or tranſportation ‡,—the Judge Advocate writes down the words, and ſo on, 'till he finiſheth with the *ſenior*. This being done, the Judge Advocate reads aloud the different opinions,—ſums up the reſpective judgments, and then having drawn out the *ſentence* agreeably to the ſentiments of the court, he is adviſed by a writer of reputation on the ſubject of Martial

* Adye.

† Articles of War.

‡ Lord George Sackville's Trial, Page 10.

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Law*, to preſerve the opinions which ſhall be given, as vouchers, ſhould a reviſionary proſecution be commenced in a common court of law. In the wording of the ſentence, however, care ſhould be had at all times to omit the word *unanimous*, for though it undoubtedly ſounds in favour of a priſoner, ſhould he be acquitted, it certainly violates the obligation of the oath, taken by each member at the formation of the court, which particularly enjoins them not to *diſcloſe* the vote or opinion of each other. How far the author of the eſſay above-mentioned, on general Courts Martial, is warranted in recommending to the Judge Advocate to preſerve a memorandum of the opinions, which ſhall be given in the courſe of paſſing ſentence on a priſoner, I know not. I would willingly acquieſce with him in opinion if in my power; but, I own it appears to me, that if any perſon is warranted in preſerving a record of that kind, it is a member of the court; for a Judge Advocate not being concerned in the judgment which is paſſed, he cannot poſſibly be called upon to anſwer for the conſequences which may enſue. Whereas a member is liable to proſecution. A Judge Advocate, may it is true, be conceived in the eye of the law, the moſt unexceptionable witneſs, as not being a party concerned; but, then as he is not ſubject to any penalty, I cannot ſee the occaſion, why he excluſively ſhould provide againſt contingencies. In trials in common therefore, it may not be amiſs for a Judge Advocate to truſt himſelf eventually to his memory. It rarely happens, that the proceedings of a Court Martial are brought into litigation in the King's Bench, and even when they are, a Judge Advocate as any other witneſs, can only be made to ſpeak to the beſt of his

* Adye.

knowledge

knowledge and belief. Evils, moreover, of great magnitude might arise from a practice of this nature. Papers might be miſlaid, or death, might occaſion them to be inſpected by thoſe, who from wantonneſs or intereſt, might give them to the public, and thereby diſcloſe the opinions of a court, which the legiſlature hath taken ſo much pains, to keep concealed.

Thus being arrived at the concluſion of the proceedings of a trial, at a General Court Martial, we ſhall next come to a few points, which it will be neceſſary for us to underſtand, as being immediately connected with our ſubject. The fair proceedings of the court, being examined, and ſigned by the Preſident and Judge Advocate (the latter himſelf always inſerting the ſentence or ſentences) and ſent or delivered to the power, by whoſe authority the court hath been aſſembled; the court then proceed on the trial of other offenders, or remain *in ordere* as a court, waiting the reſult of the opinion of that power by whom they have been conſtituted. For Courts Martial being held by the ſame authority as Civil Courts of Law, the perſon empowered to cauſe them to be held, poſſeſſes the prerogative of *once* returning them their *ſentences* for *reviſion* *; and of pardoning and remitting the puniſhment, but, not of altering, or adding to the judgments which ſhall have been given. Neither hath he the power, to cauſe an offender to be tried a ſecond time for the ſame treſpaſs, nor after his conviction or acquittal by a Civil Court of Judicature, to puniſh him otherwiſe than by caſhiering †.

* Articles of War.

† Ibid.

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However clear and explicit a trial at a Court Martial may ſeem, and however eſtabliſhed the offences and offenders may be ſuppoſed, who come immediately under its juriſdiction, it hath been doubted, whether a commander in chief of an army, not in the field, and conſequently not having a warrant empowering him to cauſe Courts Martial to be held, is liable to be tried by a court with a Colonel as its Preſident, as another officer a Colonel indiſputably may be with a Major at its head. This point, however, may be eaſily aſcertained, upon a due conſideration of the principles of Martial Ordination. The King is authorized by law to grant his commiſſion for the holding of General Courts Martial, and may delegate that power to officers commanding his armies or garriſons, as we have already obſerved (ſubject however to the reſtrictions contained in the Mutiny Act, which fix the rank and number of the officers who ſhall compoſe them.) This rank of the Preſident and members of the court not being required by the act to be varied according to the rank of the offender, it is in his Majeſty's breaſt to vary it at pleaſure, ſo as the rank required by the act is not violated. But, it is the fixed and univerſal cuſtom of the army to try officers of very high rank in a ſolemn and awful manner, and by a court compoſed of ſome officers at leaſt, if not of all, of the ſame degree. But, indeed this queſtion is not applicable to any probable caſe, for before a man can be tried, he muſt in general be arreſted by a ſuperior *; and therefore if a Commander in Chief of an army abroad, commits a military offence, there is no remedy againſt him, but, by an application at home to the Secretary at War to inform the King,

* Articles of War.

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(or the power under whose authority he acts), of his offence; in which case, if credit be given to the accusation, he must be recalled in order to be tried and punished. For though the King may consistently with law, supercede him, and issue a commission to his successor to empower him to appoint a court for his trial, consisting of those officers who may have served under his command, yet, it would be inconsistent with general practice, sound policy, and even it may be said, with justice.

Another matter of equal importance, and hitherto of as serious litigation, hath been the privilege of examining witnesses. Many have confined it to the Judge Advocate, the Members of the Court, and the Prisoner, but, others have admitted the accuser, to propound questions, as if he alone were the prosecutor. The right however, of examining witnesses at a Court Martial belongs in legal strictness to the Judge Advocate, the Members of the Court, and the Prisoner. To the Judge Advocate as Prosecutor for the Crown; to each Member of the Court for the information of his own conscience, and to the Prisoner for his defence. Yet, if an officer, witness to the misbehaviour of another, prefers an accusation against him, and the King or his delegates order a trial, solely upon the faith of such accusation, without any other information or presumption of guilt, the Judge Advocate cannot with decency refuse the Prosecutor's assistance in the conduct of the trial, and the court cannot in justice object to it; because, in many cases, the charge is not to be sustained without an examination guided by a more particular knowledge of the circumstances, than the Judge Advocate or court can possibly be acquainted with; and it would indeed be a great

great obſtruction to the public ſervice in military caſes, if an officer were deterred from bringing offenders to juſtice, leſt through the ignorance or corruption of a Judge Advocate a proſecution ſhould miſcarry; or if (after having run the riſque for the public ſervice) his zeal by the priſoner's acquital from the charge, ſhould carry the appearance of malevolence. Upon the whole, the management for the crown belongs in law to the Judge Advocate, at the ſame time that it appears his duty to receive the inſtructions, or at leaſt to communicate with the accuſer, who is ſuppoſed to be the beſt judge of the evidence neceſſary to ſupport his own accuſation. But, it is a very delicate ſituation for an officer to ſtand in, and it muſt be confeſſed not a politic one, where his perſonal aſſiſtance is not abſolutely neceſſary; becauſe, it carries with it, the air of perſecution, rather than of public juſtice, and pleads ſtrongly for the priſoner in the breaſt of the court.

Having now explained with as much brevity as has been in my ower, the principles and proceſſes of Martial Law in general, and the duty of a Judge Advocate in particular, I ſhall here conclude, with a ſingle obſervation touching the privilege of that officer, ſhould illegal meaſures be purſued in oppoſition to his opinion, and which, exonerating him, throws the burthen of the act, upon the tenacity of thoſe, who may carry it into execution. This, is to *proteſt*,—not to ſtop the proceedings of the court,—but, to enter his objections, and ſubmit them with reverence to the conſideration of his Sovereign, or to the delegates of his power.

F.

FINIS.

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